THE IMPACT OF THE *KOMAPE* JUDGMENT ON THE SOUTH AFRICAN COMMON LAW OF DELICT: AN ANALYTICAL REVIEW

Komape v Minister of Basic Education
[2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA)

1 Introduction

The case of *Komape v Minister of Basic Education* ([2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA)) arose out of tragic circumstances in which a five-year-old Grade-R learner, M, died from drowning in a pit latrine. According to the evidence, M had gone to the toilet unsupervised when he drowned (*Komape supra* par 1). Following the incident, the family unsuccessfully instituted a claim in delict for damages for emotional shock, grief and bereavement, as well as constitutional damages, in the Limpopo High Court (*Komape v Minister of Basic Education (Tebeila Institute of Leadership Education and Governance and Training Equal Education Amicus Curiae)* 2018 JDR 0625 (LP)). The family of M then appealed to the Supreme Court of Appeal (SCA). The SCA handed down its judgment on 19 December 2019, reversing the decision of the High Court. It is this judgment of the SCA that is the subject of this note (any reference to *Komape* in this note is to the SCA judgment). The SCA judgment was generally well received, especially among human rights activists advocating for children's right to education. Some advocates for human rights regard the *Komape* judgment as a giant step towards the realisation of basic rights in South Africa, in particular the right to basic education, using the common law (see Harding "Using the Common Law to Realise Basic Rights in South Africa: The Case of *Komape v Minister of Basic Education*" (8 April 2020) *@SECTION27news* https://www.right-to-education.org/fr/node/1152 (accessed 13/07/2021)). While the judgment of *Komape* has generally been welcomed, some authors may regard this judgment as a whole (that is, the High Court and SCA judgments) as a missed opportunity to develop the South African common law of emotional shock by introducing an action for pure grief (see Mukheibir and Mitchell "The Price of Sadness: Comparison Between the Netherlands and South Africa" 2019 22 *PER/PELJ* http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6413, although the authors' argument is based on the decision of the High Court). This note conducts an analytical appraisal of the SCA's decision of *Komape,* as well as its impact on the common law of delict, particularly insofar as the action for emotional shock is concerned. The note begins by outlining the factual background to the case of *Komape*. The note then advances a critical

analysis of the judgment, with some special focus on Claim B, in terms of which M's immediate family cumulatively sued the Department of Basic Education, the Limpopo Member of the Executive Council, the school principal and the school's governing body for compensation for pure grief, in addition to the general action for emotional shock and psychological lesions (*Komape supra* par 17). To achieve their goal in this regard, the family first argued for the common law to be developed in light of section 39(2) of the Constitution, 1996 (*Komape supra* par 17). Moreover, as an alternative to the second main claim (Claim B), the family argued for an award of constitutional damages, also on the basis of the common law, so developed in accordance with their initial prayer for such development (*Komape supra* par 17). After its analysis, the note offers a conclusion.

2 Factual background

This case of *Komape* arose out of the death of a five-year-old boy, M, when he fell into a pit latrine at a rural school in Limpopo Province (see *Komape supra* par 1 9–14). As M drowned in the muck, he suffered "the most appalling and undignified death" (par 1). Both the boy's father and mother had witnessed his shameful death as they came to the school while M's lifeless body was still stuck in the toilet filth (par 12). As a consequence of hearing of and witnessing the incident, the boy's parents suffered post-traumatic stress disorder and prolonged depression (par 12). In addition, his siblings suffered post-traumatic stress disorder and prolonged depression, resulting from hearing about the death of M under those deplorable conditions (par 13). Consequently, the family instituted a court action for delictual damages against the Department of Basic Education in the Limpopo High Court, citing also the Limpopo Member of the Executive Council, the boy's school principal and the school's governing body as other respondents (par 1). In addition to the claim for damages based on emotional shock (founded on post-traumatic stress disorder), the family instituted a separate claim for grief and bereavement (par 1 and 15). For the grief and bereavement claim, the family argued for the development of the common law, in terms of section 39(2) of the Constitution, 1996, to recognise a claim for compensation for grief and bereavement for the immediate family (par 17(*b*)). As an alternative to this claim (also based on developing the common law), the family argued for compensation for grief and bereavement as constitutional damages (and/or punitive damages) (par 17(*b*)). There were other peripheral claims that fall outside the scope of this note (par 17). The respondents conceded liability in respect of both main claims in the High Court, but the parties could not reach a settlement as the offer of the Department was not acceptable to the family (par 18 and 19) – hence, the matter proceeding to trial in the High Court. However, the High Court dismissed both the main claims (par 20). Moreover, the High Court refused to develop the common law to recognise a separate claim for grief and bereavement (par 21 and 22). Instead, the High Court opted to grant a structural interdict against the respondents, even though it had not been pleaded by the plaintiffs (par 20).

The matter then went on appeal to the SCA with the leave of the High Court (par 22). The appeal was against the dismissal of the prayer for a

declaratory order relating to the respondents' breach of their constitutional obligations, and the dismissal of Claim A, Claim B, and the claim for future medical expenses for M's younger sibling (par 22). In the SCA, the decision of the High Court in respect of the main claim (Claim A) was overturned, as was the denial of part of the claim in respect of M's eight-year-old brother (par 22). Furthermore, the SCA held that grief and bereavement is accounted for in the main claim (that is, the claim for emotional shock). The SCA also refused to allow the alternative to the second main claim (Claim B) to recognise grief and bereavement and award constitutional damages.

There are other noteworthy aspects of the SCA judgment. These are considered in the section below.

3 The review

It is noteworthy that the SCA judgment is well researched and gives compelling legal reasoning for the court's decision. For example, when making a finding in respect of the second main claim (Claim B), the SCA went through the jurisprudence of other jurisdictions, in addition to South African jurisprudence. In this regard, the court considered at length the legal position in England, Australia, New Zealand and Canada, as required by section 39 of the 1996 Constitution (par 58–61). Also, the SCA revisited the South African common law of delict in respect of an action for emotional shock and psychological lesions (par 24–32 and 45). The court correctly remarked that an action for emotional shock and psychological lesions was long settled and trite in South African law. Indeed, the South African law of emotional shock was settled in 1972, in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* (1973 (1) SA 769 (A)) and the SCA reaffirmed the position as far back as 2001 in the judgment of *Road Accident Fund v Sauls* (2002 (2) SA 55 (SCA)). Primarily, the action for emotional shock and psychological lesions is based on delict under the *actio legis aquilae* (*lex Aquilia)* and, as such, all the basic elements for delictual liability have to be present for the action to succeed. The elements are: conduct in the form of a commission or an omission, wrongfulness, fault, causation and harm (in the form of emotional shock) (Neethling and Potgieter *Neethling–Potgieter–Visser Law of Delict* 7ed (2015) 300–305; Raheel and Steynberg "Claims for 'Emotional Shock' Suffered by Primary and Secondary Victims" 2015 78 *THRHR* 181–199). It is a legal requirement that emotional shock (or harm) should be accompanied by a psychological injury that is "reasonably serious" (*Media 24 Ltd v Grobler* [2005] 3 All SA 297 (SCA) par 23 and par 56–60; *Barnard v Santam BPK* 1999 (1) SA 202 216E–F; see also Neethling and Potgieter *Law of Delict* 301–302). Thus, an insignificant emotional shock that lasts for a short duration is not actionable in terms of the law (*Majiet v Santam Limited* [1997] 4 All SA 555 (C) 555h–i to 566d–e; see Raheel and Steynberg *THRHR* 190–191; see also Neethling and Potgieter *Law of Delict* 302).

In casu, the SCA dismissed a claim for damages based purely on grief and bereavement, which the appellants had argued for under Claim B. In rejecting this appeal for an action based purely on grief and bereavement, and which is not detectable as psychological injury, the SCA revisited the legal position in other jurisdictions, in line with section 39(1)(*c*) of the

Constitution, which bestows discretion on the South African courts to consider foreign law (see par 28–31 and 34–37). It found that there were jurisdictions that allowed claims for pure grief and bereavement, but that in those jurisdictions there had been legislative interventions that recognised such actions (par 33–40). In contrast, the SCA found that there is no such legislation in South Africa, despite the fact that a call for such intervention was made long ago in the judgment of *Warneke* (*Union Government (Minister of Railways and Harbours* v *Warneke* 1911 AD 657) (*Komape supra* par 35 and 37). The SCA, in the present case, correctly held that what the family of M sought to recover as compensation for pure grief and bereavement under Claim B had been catered for under the main claim in the quantum to be awarded. For example, the court held:

> "[The] appeal against the dismissal of claim B fails because the recoverable damages described therein are to be compensated under Claim A". (par 50)

The SCA went on to conclude:

> "In the light of this, I tum to consider the quantum of the damages suffered by the appellants in respect of the claim for emotional trauma and shock, which will include allowance for their grief and bereavement." (par 51)

The law, through an action for emotional shock, compensates for serious psychological injury, be it post-traumatic stress disorder, emotional distress, depression, nervous shock, or fright, to name a few (see for e.g., Neethling and Potgieter *Law of Delict* 300; *Komape supra* par 50–51). Viewed in this light, psychological lesion is an end result of prolonged grief and bereavement, which begins as emotional shock as a result of the plaintiff's conduct (a commission or an omission). Accordingly, the author is in full accord with the court that awarding the appellants separate damages for grief and bereavement would amount to an unwarranted duplication of awards.

Thirdly, *in casu,* the SCA declined to develop the common law in terms of section 39(2) of the Constitution, and also declined to allow a claim prayed for as an alternative to Claim B. In regard to development of the common law, section 39(2) of the Constitution provides that "when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights". As a matter of principle, the courts have an inherent power to develop the common law in terms of s 173 of the Constitution (see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) par 33 and 39). Still, development of the common law, where it is deficient, ought to be carried out in a certain systematic pattern. In that regard, the Constitutional Court held in *Carmichele* that development of the common law in terms of section 39(2) of the Constitution, 1996 ought to be undertaken with due regard to the "spirit, purport and objects" of the Bill of Rights (*Carmichele supra* par 32). Meanwhile, litigants have a corresponding obligation to ensure a "reliable and harmonious" development of the jurisprudence under the Constitution by raising constitutional arguments. This has long been affirmed by the Constitutional Court (see for e.g., *Carmichele supra* par 39 and 41).

In *Carmichele*, Ackermann J adopted a two-fold approach to the development of the common law in terms of section 39(2) of the Constitution

(*Carmichele supra* par 40) whereas, in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* (2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC)), Van der Westhuizen J advanced a five-pronged approach to the development of the common law in terms of section 39(2) of the Constitution (par 38). According to Ackermann J, a court first needs to satisfy itself that the common law is deficient and requires development in order to be brought in line with the objectives of section 39(2) (par 39; see also *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA); [2014] 4 All SA 452 (SCA) par 22 and 24). Secondly, such a court has to take into account policy considerations such as fairness and the interests of justice (*Carmichele supra* par 40). Effectively, the second stage of the enquiry looks into the manner in which such development ought to be carried out so as to meet the objectives of section 39(2) of the Constitution. Among other considerations, the development of the common law in terms of section 39(2) needs to be carried out in a manner that allows 'for the most appropriate development of the common law within its own paradigm' (*Carmichele supra* par 40). In other words, the development of the common law should be carried out with minimal disturbance to the foundational principles of the relevant branch of the law under consideration. The court will only proceed to the second part of the enquiry when it has ascertained that the common law was inadequate and required development. The SCA *in casu* outlined the authorities and the legal criteria for developing the common law, commencing with the principles laid down by the Constitutional Court (CC) in *Carmichele* (see *Komape supra* par 41).

On the other hand, Van der Westhuizen J stated the following in *Mighty Solutions CC:*

> "Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law." (par 38)

The approach adopted by Van der Westhuizen J in *Mighty Solutions CC* should not be viewed as being at odds with the one adopted in *Carmichele.* Instead, the *Mighty Solutions CC* approach should be viewed as an amplification of *Carmichele.* This view may be premised on a couple of factors. For one, *Mighty Solutions CC* does not criticise the stance that *Carmichele* takes towards the development of the common law. Instead, the court reaffirms the other part of *Carmichele* regarding the need to guard against encroaching on the functions of the legislature as the primary organ of state entrusted with the responsibility to legislate in accordance with the principle of the separation of powers (par 39; see also *Carmichele supra* par 36). Moreover, a closer examination of the approaches in both *Carmichele* and *Mighty Solutions CC* reveals that the two are in harmony with, and complimentary to each other. Therefore, although the Constitutional Court has adopted two lines of thought with regard to the development of the common law, one can safely conclude that the test for the development of the common law, in terms of section 39(2) of the Constitution, has been settled in South African law.

Of course, the author is mindful of the criticism that authors Davis and Klare level against this approach of *Carmichele*; they argue that it is un-transformative or potentially problematic, as it commits itself too strongly to the common law at the expense of constitutional goals (Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" 2010 *SAJHR* 403). The author is unable to agree with the learned authors' criticism of the approach in *Carmichele,* for several reasons. For one, the stance that the court has taken safeguards the rule of law and its principle of legality, which, among other things, entails that there should be certainty in the law. The rule of law, which is inherent in the principle of legality, has been held by the Constitutional Court to be fundamental to constitutional law (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) par 58; *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) par 38 and 39). Also, *Carmichele* gives due regard to the principle of the separation of powers, which holds that it is Parliament, and not the courts, that is tasked with the primary authority to drive law reform (*Carmichele supra* par 36; *Mighty Solutions CC supra* par 39; see also *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) par 61 and 105). Moreover, our courts have long settled the relationship between the Constitution, on the one hand, and other branches of our law on the other. For example, in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* (2003 (1) SA 389 (SCA) par 12)*,* the SCA held that the Constitution does not trump other laws in the Republic; it merely acts as a touchstone for what is lawful and unlawful in a constitutional democracy. Thus, in the author's opinion, Davis and Klare's criticism of the approach in *Carmichele* is without sound basis.

It is submitted that Claim B, and its alternative*,* in the case of *Komape* amount to an unnecessary duplication of claims. As the SCA held, a claim for grief and bereavement (appellants' Claim B) ought not to have been argued separately from Claim A, as grief and bereavement would have been inherently taken into account when calculating the amount of damages (quantum) to be awarded to the appellants for emotional shock (par 50–51). In short, the common law in the area of emotional shock and psychological injury is not deficient and, as such, it was not in need of development. Moreover, it is submitted that, even if the South African common law were deficient in that it did not recognise an independent claim for grief, *Komape* was not the right case to argue for such development. The appellants were not left without a remedy under the common law of delict; and thus, there was no injustice to be suffered under the circumstances of their case. A development of the common law may be appropriate and necessary where a defendant's wrongful conduct causes the plaintiff serious grief and bereavement, although not accompanied by psychological injury nor amounting to constitutional damages. In other words, since a delictual claim for emotional shock requires psychological lesions that are serious, a close family member who suffers serious grief would be without a remedy in law unless grief and bereavement were accompanied by psychological injury or the conduct causing such grief amounted to a violation of the plaintiff's constitutional rights.

Lastly, the SCA declined to award constitutional damages and to issue a declaratory order to the effect that the Department of Basic Education (and the other respondents) were in violation of the constitutional duty they owed the learners. The court reached this conclusion after considering various legal authorities, including both domestic and foreign jurisprudence (*Komape supra* par 58–63). In respect of constitutional damages, the courts have held that they would only award such damages where the existing law (including development of the common law in terms of section 39(2) of the Constitution,1996) is (or would be) inadequate to vindicate a violation of or threat against a citizen's rights (*Residents of Industry* House*, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37 par 89–103; *Mboweni supra* par 22–24; *Fose v Minister of Safety and Security* 1997 (7) BCLR 851; 1997 (3) SA 786; see also *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd)* 2005 (5) SA 3 (CC) par 57(*sic)*–57 *and 64–65; MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) par 23–26). The only issue that was left open was whether an action for constitutional damages was available for a breach of, and/or threat to, any other rights enshrined in the Bill of Rights or Chapter 2 of the Constitution, or whether the awarding of damages qualifies as appropriate relief in such instances (see *Fose supra* par 20 and *Kate supra* par 25). In the case of *Fose*, the applicant had sued the Minister of Safety and Security in delict for damages arising out of a series of assaults perpetrated by members of the police (*Fose supra* par 12–13). Additionally, Fose (the applicant) had also claimed for "constitutional damages" for exactly the same incidents (*Fose supra* par 13 and 23). However, the Constitutional Court held that Fose's constitutional rights would be powerfully vindicated through the award of substantial damages for the assault allegedly perpetrated against him by members of the police – that is, using the normal Aquilian action (*Fose supra* par 67). On the other hand, delictual damages aim to compensate, whereas the constitutional remedy is aimed at affirming constitutional values: that is, to enforce, protect and vindicate guaranteed rights and the values that underpin them (*Fose supra* par 19, 61, 82, 83, 96 and 98). The court accordingly held that there was no place in our law for constitutional damages as an addition to an award for delictual damages (*Fose supra* par 67 and 75; see also *Komape supra* par 59) However, recently in *Thubakgale v Ekurhuleni Metropolitan Municipality* ([2021] ZACC 45), the Constitutional Court has asserted that constitutional damages may be awarded even where there are alternative remedies that are available to the aggrieved party (par 46). Such will be the case where an award of constitutional damages is the most effective remedy (appropriate relief) to vindicate the constitutional rights that have been violated (*Thubakgale supra* par 46). In *Thubakgale,* the court also reminds us that a violation of constitutional rights such as dignity goes beyond infringement of an individual litigant, and may be an attack against the "[South African] constitutional project as a whole" (par 43). In such cases, constitutional damages may be awarded as opposed to traditional remedies that may be available in any particular circumstances (see *Thubakgale supra* par 44–45). In *Thubakgale*, the Constitutional Court has also dispelled the notion that constitutional damages are intended to be punitive (par 43 and 46–50).

The stance that the courts have maintained regarding the awarding of constitutional damages as an alternative, rather than as an addition to other remedies available in any particular situation, is preferable and not without merit, in light of the limitation of available resources in South Africa. Among other things, awarding constitutional damages in addition to other awards may amount to an unjust duplication of compensation and a "windfall" for the plaintiff (*Fose supra* par 65; see for instance the Constitutional Court's statement in *Le Roux v Dey* 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) par 139–143 in respect of the *actio iniuriarum*. It is submitted that the same principle would also apply in respect of the *Aquilian action*). A claim for constitutional damages is inherently (or at least potentially) punitive in nature (see *Mboweni supra* par 5; *Fose supra* par 62–65) This is at odds with the nature of a claim for damages, which is compensatory (see *Fose supra* par 63). Thus, the courts need to use this remedy only in limited circumstances, especially where conventional remedies are inadequate to atone for constitutional rights disturbed or threatened, as has been argued in this note. Furthermore, an unrestrained award for constitutional damages could have far-reaching implications for defendants, especially private individuals (or non-state persons). For defendants, an unrestrained award for constitutional damages would pose a double jeopardy, as it would amount to compensating plaintiffs twice, and the imposition of punitive damages. For the State as a defendant, it would result in an extra burden for taxpayers, who are the ones paying the damages to compensate a plaintiff for the State's wrongdoing (see *Mboweni supra* par 25). The author shares the same sentiments expressed in *Mboweni* (*supra* par 25) and *Fose* (*supra* par 71–72) that the awarding of constitutional damages may only serve to enrich the plaintiff, rather than serve as deterrence. This is not to say that the author rejects the sentiments expressed by the SCA in *Kate*:

> "Courts should not be overawed by practical problems. They should 'attempt to synchronise the real world with the ideal construct of a constitutional world' and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach." (*South Africa v Modderklip Boerdery (Pty) Ltd*) 2004 (6) SA 40 (SCA) par 42; *Kate supra* par 24)

Nevertheless, this assertion does not imply that the courts should indiscriminately award (punitive) constitutional damages even where infringed rights can be indirectly and effectively vindicated through the awarding of common-law damages. However, some authors advocate for constitutional damages in preference to conventional remedies owing to its deterrent effect in the hope that this will spur the State into action to prevent future violations of citizens' constitutional rights (see Barns "Constitutional Damages: A Call for the Development of a Framework in South Africa" 2013 *Responsa Meridiana* https://www.journals.ac.za/index.php/responsa/article/view/3790/2182 (accessed 2021-12-10)). The author concurs with the view that conventional remedies are often sufficiently broad and flexible enough to fully vindicate infringed or threatened plaintiffs' constitutional rights (*Fose supra* par 58*(b)*; *Kate supra* par 27).

In the present case of *Komape*, the SCA also made clear that it was inappropriate to award constitutional damages to the appellants, as the problem of the lack of proper toilets in public schools was not an isolated issue (par 59 and 63). Instead, the problem affected many other learners

across the province (par 66), and maybe across the country. Therefore, the court correctly held that it would serve no purpose to use the public purse to pay

> "a handful of persons a substantial sum over and above the damages they have sustained and for which they have been compensated." (par 63)

In the author's view, it would appear that the claim for constitutional damages had been motivated by the awarding of such damages in the *Life Esidimeni* arbitration, in which the former Deputy Chief Justice (DCJ) Moseneke ordered the Departments of Health (National and Gauteng Provincial Health Department) to pay constitutional damages to relatives of patients who had died under inhumane and appalling conditions (Life Esidimeni Arbitration Award http://www.saflii.org/images/LifeEsidimeni ArbitrationAward.pdf*;* see also *Komape supra* par 62). The SCA categorically rejected any reference to the *Life Esidimeni* arbitration award, holding that that matter was distinguishable from the present case and that the *Life Esidimeni* arbitration award was not binding on the SCA or courts in general (*Komape supra* par 62).

Whereas the SCA may have been correct that an arbitration award has no legal effect on courts, the author disagrees with the court that the *Life Esidimeni* matter is distinct from the *Komape* case. Instead, it is the author's view that the two have similar characteristics; in both, there has been death in appalling and dreadful circumstances. It is public knowledge that in the *Life Esidimeni* matter, some patients were starved and covered in their own faeces (*Life Esidimeni* arbitration award par 109; see also par 90, 95 and 187). In the author's view, the main difference is that *Life Esidimeni* involved hundreds of persons, whereas *Komape* involved only one death. While the facts of the two cases are different, the circumstances under which death occurred are similar and the perpetrator who failed to discharge constitutional obligations is the same, namely the State. Nevertheless, in the *Komape* judgment, the SCA has given clarity regarding the value in our jurisprudence of arbitration awards such as the *Life Esidimeni* arbitration award. Arbitration awards are not binding on our courts. Authors, like Dutilleux are in agreement that arbitration awards do not form part of the jurisprudence, unless an award has been made an order of the court or an award has been to court by way of judicial review (Dutilleux "To Arbitrate, or not to Arbitrate: That Is the Question: The Development of Jurisprudence in South Africa?" (26 May 2020) https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-26-may-to-arbitrate-or-not-to-arbitrate-that-is-the-question-the-development-of-jurisprudence-in-south-africa.html (accessed 2021-10-20)). In fact, the author decries the status quo and argues that it may lead to stagnation of the development of jurisprudence, given the increase of arbitrations in South Africa (Dutilleux https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-26-may-to-arbitrate-or-not-to-arbitrate-that-is-the-question-the-development-of-jurisprudence-in-south-africa.html). It is submitted that the *Life Esidimeni* award was one of a kind; it was unlike those arbitrations that are usually in the area of labour law, and those involving private disputes. Instead, the *Life Esidimeni* arbitration was between an organ of state (the provincial department for health) and

citizens. Most importantly, the central issue in the *Life Esidimeni* arbitration concerned the State's violation of citizens' rights enshrined in the Bill of Rights, especially the human dignity of mental health patients (and their immediate families). Also of significance, the arbitrator was a former Deputy Chief Justice (the erstwhile second highest judge in the Republic), Moseneke. In view of the foregoing, it is submitted that arbitration awards such as the *Life Esidimeni* arbitration award should have a persuasive value in our jurisprudence.

In respect of declaratory orders, as a general rule, the court will only grant it as relief if it is satisfied that such a declaratory order will serve a particular purpose and the applicant proves that he has an identifiable constitutional right. In the present case, the SCA found that the declaratory order would not serve any useful purpose since the High Court had already reprimanded the Department of Basic Education for failure to discharge its constitutional obligations in respect of the learners (*Komape supra* par 66). The SCA was correct to refuse to grant the declaratory order that the appellants were seeking. That the Department of Basic Education was in violation of its constitutional obligation by failing to provide learners with safe toilets was already common cause between the parties. It is submitted that the declaratory order sought is already accounted for in the delictual element of wrongfulness (unlawfulness). Indeed, the appellants would not have succeeded with their main claim for emotional shock (Claim A) without proving wrongfulness. In this regard, wrongfulness would have been in the form of omission and a breach of a legal duty owed to the learners (*Van Eeden v Minister of Safety and Security supra* par 9–12; see also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A)).

4 Conclusion

This note has provided a critical review of the SCA judgment in *Komape v Department of Basic Education* with regard to the family's claim for pure grief and bereavement (Claim B) in addition to their delictual claim for emotional shock and psychological injury. The note has argued that the SCA correctly dismissed the appellants' action for grief and bereavement, and their attempt to develop the common law to recognise such a claim for pure grief and bereavement not accompanied with serious psychological injury. The court saw no distinction between grief and psychiatric harm but vehemently stated that showing grief without proving psychiatric harm cannot be actionable in law. Merely showing grief on its own is not sufficient for a delictual claim to succeed. Thus, the judgment of *Komape* affirms that, under South African law, there is no separate action or compensation for pure grief and bereavement that is not accompanied by substantial psychological lesions. Instead, in order to be entitled to compensation, it is still necessary to prove psychiatric injury in an action for emotional shock. The note also argued that the SCA was correct to hold that grief and bereavement, in general, is properly accounted for when assessing the quantum for emotional shock and psychological lesions. Moreover, this note has argued that the SCA was also correct to hold that awarding constitutional damages was not the appropriate relief in the circumstances of the appellants' case. The appellants had been awarded a substantial amount in damages for the main

claim (Claim A). Furthermore, the family of the appellants was one among many families affected by the problem of a lack of proper toilets in public schools in the province of Limpopo. The judgment of *Komape* has reaffirmed the South African law regarding an action for emotional shock and psychological injury. The judgment has also provided a comparative view of the law in an action for emotional shock and psychological injury. It has surveyed the legal position from different (foreign) jurisdictions, more especially with regard to an action based purely on grief and bereavement that is not accompanied by serious psychological lesions. To some extent, and despite declining an invitation to develop the common law to recognise compensation for pure grief and bereavement, the *Komape* judgment has also laid the foundational basis for a possible future development of South African law in appropriate case circumstances. Such development of this area of law could either be through a legislative process or by the courts should the need arise in appropriate circumstances, as is the position in other jurisdictions. *Komape* has amplified and restated the South African law with regard to the awarding of constitutional damages. Without a doubt, it has become another valuable source of reference on the South African law on emotional shock and psychological injury, as well as grief and bereavement.

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